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OFFICE OF ADMINISTRATIVE HEARINGS HEARINGS OFFICE
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
STATE OF HAWAII

In the Matter of	)	PCH-2002-18
)	
FRANK COLUCCIO CONSTRUCTION CO.,	)	HEARINGS OFFICER'S FINDINGS
	)	OF FACT, CONCLUSIONS OF
Petitioner,	)	LAW, AND ORDER GRANTING
	)	(1) RESPONDENT'S MOTION TO
vs.	)	DISMISS PETITIONER'S REQUEST
	)	FOR ADMINISTRATIVE REVIEW
DEPARTMENT OF BUDGET AND	)	AND (2) INTERVENOR/RESPONDENT
FISCAL SERVICES, CITY AND	)	WESTCON MICROTUNNELING,
COUNTY OF HONOLULU,	)	INC.'S MOTION TO DISMISS
	)	PETITIONER FRANK COLUCCIO
Respondent,	)	CONSTRUCTION CO.'S REQUEST
	)	FOR ADMINISTRATIVE REVIEW
and	)	FILED ON DECEMBER 27, 2002
)	
WESTCON MICROTUNNELING, INC.,)	
)	
Intervenor/Respondent.)	
)	

HEARINGS OFFICER'S FINDINGS OF FACT, CONCLUSIONS
OF LAW, AND ORDER GRANTING (1) RESPONDENT'S MOTION TO DISMISS
PETITIONER'S REQUEST FOR ADMINISTRATIVE REVIEW AND (2) INTERVENOR/RESPONDENT
WESTCON MICROTUNNELING, INC.'S MOTION TO DISMISS PETITIONER FRANK COLUCCIO
CONSTRUCTION CO.'S REQUEST FOR ADMINISTRATIVE REVIEW FILED ON DECEMBER 27, 2002

Respondent Department of Budget and Fiscal Services, City and County of Honolulu's ("Respondent") Motion to Dismiss Petitioner's Request for Administrative Review and Intervenor/Respondent Westcon Microtunneling, Inc.'s ("Westcon") Motion to Dismiss Petitioner Frank Coluccio Construction Co.'s Request for Administrative Review Filed On December 27, 2002, having come on for hearing before the undersigned Hearings Officer on February 4, 2003; Charles W. Gall, Esq. appearing for Westcon; Amy R. Kondo, Esq. appearing for Respondent; and Ken T. Kuniyuki, Esq. appearing for Petitioner Frank Coluccio Construction Co. ("Petitioner"); and after due consideration of the motions,

memoranda, affidavits and exhibits filed herein and the arguments of counsel in light of the entire record in this matter, the Hearings Officer hereby sets forth the following Findings of Fact, Conclusions of Law and Order.

I. FINDINGS OF FACT

1. On or about October 18, 2001, Respondent issued an Invitation for Bids ("IFB"), seeking sealed bids for Job W8-01 Kalaheo Avenue Reconstructed Sewer-Phase 1, Kailua, Oahu, Hawaii ("Project").

2. On February 7, 2002, bids in response to the IFB were submitted by Petitioner and Westcon, respectively.

3. The total sum of Petitioner's bid was \$33,382,875.00. The total sum of Westcon's bid was \$32,070,337.43.

4. On February 7, 2002, the designated bid opening date, Respondent opened the sealed bids, tabulated them and determined that the apparent low bid had been submitted by Westcon. Petitioner was deemed to be the second lowest bidder.

5. On February 7, 2002, immediately following the opening of the bids, Petitioner requested to see the bid documents Respondent had available including the Westcon bid documents. A December 13, 2001 letter from Rae M. Loui to Westcon regarding Respondent's review and evaluation of Westcon's statement of qualification was not among the documents provided to Petitioner on February 7, 2002.

6. On February 12, 2002, Petitioner protested the contemplated award of the contract for the Project to Westcon.

7. On or about April 23, 2002, Respondent denied Petitioner's protest and on April 29, 2002, Petitioner filed a Request for Administrative Review of its protest and Respondent's determination of that protest with the Office of Administrative Hearings. That matter was designated as PCH-2002-7.

8. On August 2, 2002, the Hearings Officer issued his Findings of Fact, Conclusions of Law, and Decision in PCH-2002-7.

9. On August 12, 2002, Respondent and Westcon applied for judicial review of the Hearings Officer's decision in PCH-2002-7.

10. On September 26, 2002, Respondent certified in writing that there were sufficient funds (\$16,854,779.43) available to cover Contract No. F-00712 involving the work required in the Basic Bid and the first two additives of the Project, approved a waiver of the "failure of Westcon Microtunneling Inc. to list a subcontractor for C-37d water chlorination pursuant to Hawaii Revised Statutes Section (HRS) 103D-302(b)", notified Westcon by letter that Westcon would be awarded the contract and provided a copy of that letter to Petitioner, and posted a notice of the award of the contract to Westcon.

11. On September 27, 2002, Petitioner filed a Request for Administrative Review and to Reconvene Proceedings with the Office of Administrative Hearings to consider Respondent's waiver of Westcon's failure to list a subcontractor for the water chlorination work. This matter was designated as PCH-2002-12.

12. On October 4, 2002, Westcon executed Contract No. F-00712.

13. On October 14, 2002, Westcon filed a motion to dismiss Petitioner's September 27, 2002 request for administrative review. Respondent filed a Joinder and Petitioner filed a memorandum in opposition to the motion on October 15, 2002.

14. On October 15, 2002, Petitioner submitted to Respondent's Department of Design and Construction, Wastewater Design & Engineering Division ("DDC"), a request under HRS §92-11, seeking copies of all documents between the City and Westcon or R.H.S Lee, Inc. from October 18, 2001.

15. On October 18, 2002, the Hearings Officer granted Westcon's motion to dismiss Petitioner's request for administrative review and to reconvene proceedings (PCH-2002-12).

16. On October 21, 2002, Respondent executed Contract No. F-00712.

17. On October 23, 2002, Petitioner filed a Notice of Appeal to the Circuit Court seeking judicial review of the Hearings Officer's October 18, 2002 order granting Westcon's motion to dismiss Petitioner's request for administrative review and to reconvene proceedings (PCH-2002-12).

18. On October 29, 2002, in response to Petitioner's request for government records, Respondent issued a Notice to Requester advising Petitioner that copies of the requested documents would be made available for inspection.

19. On October 30, 2002, Petitioner's attorney inspected the records and by a letter sent on November 1, 2002, confirmed with Respondent that the records had not been made available because Respondent's attorney had not been aware that a separate request was issued for DDC's records. On November 8, 2002, the records were made available for inspection.

20. On November 12, 2002, Petitioner filed the instant protest. In its protest letter, Petitioner alleges in pertinent part:

1. Weston's core subcontractor, R.H.S. Lee, Inc., was never prequalified as required by the bid solicitation and as such Westcon is non-responsive, non-responsible, and its bid should have never been considered.
2. Westcon itself cannot perform the deep trench excavation work nor the Shaft Construction work because it listed on its bid form and testified that Lee will do this work.
3. Korl cannot perform any work on the Project, as it was never listed as a subcontractor on P90 of Westcon's bid form. In addition, Korl is unqualified to do any deep trench excavation work or shaft construction work on the Project.
4. Westcon being unqualified is further justification for the City not waiving Westcon's subcontracting listing violations.

21. By letter dated December 17, 2002 and mailed to Petitioner on December 23, 2002, Respondent denied Petitioner's November 12, 2002 protest as untimely.

22. On December 27, 2002, Petitioner filed the instant Request for Administrative Review of Respondent's denial of the November 12, 2002 protest.

II. CONCLUSIONS OF LAW

In bringing these motions, Respondent and Westcon contend that Petitioner's November 12, 2002 protest was untimely and as a result, the Hearings Officer lacks jurisdiction to consider Petitioner's request for administrative review of that protest. Hawaii Revised Statutes ("HRS") §103D-701 provides in pertinent part:

§103D-701 Authority to resolve protested solicitations and awards. (a) Any actual or prospective bidder, offeror, or contractor who is aggrieved in connection with the solicitation or award of a contract may protest to the chief procurement officer or a designee as specified in the solicitation. *A protest shall be submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto; provided that a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract either under section 103D-302 or 103D-303, as applicable; provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.*

(Emphasis added).

In 1999, the Legislature passed Senate Bill (“S.B.”) No. 1101 which amended HRS §103D-701(a) by adding the proviso that “a protest of an award or proposed award shall in any event be submitted in writing within five working days after the posting of award of the contract either under section 103D-302 or 103D-303 as applicable”. Prior to the amendment, the only time limitation imposed by HRS §103D-701(a) was that protests be “submitted in writing within five working days after the aggrieved person knows or should have known of the facts giving rise thereto”. The Legislature’s objective in amending HRS §103D-701(a) is reflected in both the language of the amendment and the underlying legislative history.

The amendment expressly requires that protests of an award or proposed award *shall in any event* be submitted within five working days after the posting of the award¹. Interestingly, S.B. No. 1101 also added a second proviso: “provided further that no protest based upon the content of the solicitation shall be considered unless it is submitted in writing prior to the date set for the receipt of offers.” Although not directly applicable here, that proviso along with the one in question are consistent with and clearly evidence a

¹ Petitioner charges that this amendment is a technical, nonsubstantive amendment. While some of the other amendments in S.B. No. 1101 are nonsubstantive, the amendment in question here is clearly substantive in nature.

deliberate attempt by the Legislature to expedite the resolution of protests by creating absolute deadlines for the filing of protests.

This conclusion is buttressed by the accompanying legislative history: “Your Committee is in support of this measure [S.B. No. 1101] as a means of promoting greater efficiency in procurement procedures.” *SCRep No. 223 (Senate Journal 1999)*; ² “The measure also expands the scope of post-award remedies . . . , and *limits standing to seek administrative and judicial relief.*” *SCRep No. 651 (Senate Journal 1999)* (*emphasis added*). The importance the Legislature placed on the expeditious processing of protests has also been recognized in a prior case:

In determining whether Petitioner filed its protest within the required period, the Hearings Officer is mindful of the purpose of the HRS Chapter 103D and its implementing rules “to promote economy, efficiency, and effectiveness in the procurement of goods and services.” **See HAR §3-120-1. See also, Standing Committee Report No.S8-93, 1993 Senate Journal, at 39.** Moreover, it is significant to note that R9-101.03.1 of the Recommended Regulations for the American Bar Association’s Model Procurement Code for State and Local Governments suggests a 14-day period within which to file protests rather than the shorter 5-day period provided in HAR §3-126-3(a). It is also noteworthy that although the Recommended Regulations in an Editorial Note suggest that “[j]urisdictions may wish to allow consideration of protests filed after [14 days] for good cause shown”, no such exception was included in HAR §3-126-3. These considerations underscore the importance the Legislature placed on the expeditious processing of protests through an efficient and effective procurement system so as to minimize the disruption to procurements and contract performance. *Those considerations also support the notion that government is entitled to know, with some degree of certainty, when cases may be brought and when they may not. The accomplishment of these objectives requires strict adherence to time constraints for the initiation and prosecution of protests.*

² Moreover, one of the purposes in enacting HRS Chapter 103D was to ensure “efficiency in the procurement process.” Standing Committee Report No. S8-93 (Senate Journal 1993).

GTE Hawaiian Telephone Co., Inc. v. County of Maui, PCH-98-6 (December 9, 1998)(emphasis added).

Accordingly, the Hearings Officer concludes that HRS §103D-701(a) requires that protests be filed within five working days after the bidder knew or should have known of the facts giving rise to the protest but no later than five working days after the posting of the award³. Petitioner does not dispute that the award of the contract was posted on September 26, 2002 and that its protest was not filed until November 12, 2002. Instead, Petitioner contends that Respondent and Westcon should be equitably estopped from asserting a violation of the timeliness requirements of HRS §103D-701(a) because it relied upon Respondent's February 7, 2002 disclosure of Westcon's bid documents and reasonably believed that Respondent had made all relevant documents available to Petitioner.

Petitioner correctly points out that generally, equitable estoppel may be applied against governmental agencies to prevent manifest injustice. However, it is also true that courts have refused to apply the doctrine where to do so would frustrate a public policy. *See Chojnacki et al. v. Nieski et al, 1995 Mass. Super. Lexis 107*. Rather, the doctrine should be applied only when the failure to do so would operate to defeat a right legally and rightfully obtained – it cannot create a right; nor can it operate to relieve one from the mandatory operation of a statute. *Scheurer v. New York City Employees' Retirement System, et al., 636 N.Y.S.2d 291 (1996).*

Here, the application of equitable estoppel would indeed frustrate the policy underlying HRS §103D-701(a) by relieving Petitioner from the clear and unambiguous time limitation set forth in HRS §103D-701(a) for the filing of protests. As such, the application of the doctrine here would be tantamount to creating a right where none exists. For these reasons, the Hearings Officer concludes that the doctrine of equitable estoppel under the circumstances presented here is inapplicable as a matter of law.

³ According to Petitioner, this interpretation would lead to the absurd result of precluding the filing of a protest once the award has been posted and the 5-day period has lapsed even though the basis for the protest was not discovered (and perhaps even concealed by the agency), until well after the posting of the award. Thus, Petitioner contends that a protest is timely so long as it is filed within 5 working days after the protestor knew or should have known of the facts giving rise to the protest. HRS §103D-701(a) as amended, however, reflects an attempt by the Legislature to strike a balance between two competing policies: the need to protect against government corruption and *the need for finality in the procurement process*.


In the alternative, Petitioner urges the Hearings Officer to apply HRS §657-20⁴ to this case and conclude that the protest was timely or that genuine factual issues remain for adjudication. A plain reading of that section however, leads to the conclusion that its applicability is limited to "actions mentioned in this part or section 663-3" Furthermore, Petitioner does not point to and the Hearings Officer cannot find any authority to support this argument. Based upon these considerations, this argument is rejected.

III. ORDER

Accordingly, based upon the above findings of fact and conclusions of law, Respondent's Motion to Dismiss Petitioner's Request for Administrative Review and Westcon's Motion to Dismiss Petitioner Frank Coluccio Construction Co.'s Request for Administrative Review Filed On December 27, 2002 are granted and the above-entitled matter is hereby dismissed; each party to bear its own attorney's fees and costs.

DATED at Honolulu, Hawaii: _____

FEB 13 2003



CRAIG H. UYEHARA
Administrative Hearings Officer
Department of Commerce
and Consumer Affairs

⁴ HRS §657-20, entitled "Extension by fraudulent concealment" provides in part, "[i]f any person who is liable to any of the actions mentioned in this part or section 663-3, fraudulently conceals the existence of the cause of action . . . the action may be commenced at any time within six years after the person who is entitled to bring the same discovers or should have discovered, the existence of the cause of action . . . although the action would otherwise be barred by the period of limitations."